UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/627,384	07/25/2003	Karl P. Ronn	8362C	3913

27752 7590 09/22/2005

THE PROCTER & GAMBLE COMPANY
INTELLECTUAL PROPERTY DIVISION
WINTON HILL TECHNICAL CENTER - BOX 161
6110 CENTER HILL AVENUE
CINCINNATI, OH 45224

EXAMINER	
ANDERSON, CATHARINE L	
ART UNIT	**PAPER NUMBER**
3761	

DATE MAILED: 09/22/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	10/627,384	RONN ET AL.	
	Examiner	Art Unit	
	C. Lynne Anderson	3761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☐ Responsive to communication(s) filed on _____.

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-20* is/are pending in the application.

4a) Of the above claim(s) *8-13 and 20* is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-7 and 14-19* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date *10/2/03*.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____ .
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: _____.

DETAILED ACTION

Election/Restrictions

Restriction to one of the following inventions is required under 35 U.S.C. 121:

I. Claims 1-7 and 14-19, drawn to disposable diapers, classified in class 604, subclass 385.02.

II. Claims 8-13 and 20, drawn to a method of marketing diapers, classified in class 705, subclass 500.

The inventions are distinct, each from the other because of the following reasons:

Inventions I and II are related as product and process of use. The inventions can be shown to be distinct if either or both of the following can be shown: (1) the process for using the product as claimed can be practiced with another materially different product or (2) the product as claimed can be used in a materially different process of using that product (MPEP § 806.05(h)). In the instant case the disposable diapers may be marketed and used in a manner other than that disclosed in claims 8-13 and 20.

Because these inventions are distinct for the reasons given above and have acquired a separate status in the art as shown by their different classification, restriction for examination purposes as indicated is proper.

During a telephone conversation with Jay Krebs on 16 August 2005 a provisional election was made with traverse to prosecute the invention of the diapers, claims 1-7 and 14-19. Affirmation of this election must be made by applicant in replying to this Office action. Claims 8-13 and 20 are withdrawn from further consideration by the examiner, 37 CFR 1.142(b), as being drawn to a non-elected invention.

Applicant is reminded that upon the cancellation of claims to a non-elected invention, the inventorship must be amended in compliance with 37 CFR 1.48(b) if one or more of the currently named inventors is no longer an inventor of at least one claim remaining in the application. Any amendment of inventorship must be accompanied by a request under 37 CFR 1.48(b) and by the fee required under 37 CFR 1.17(i).

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

> The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 1-7 and 14 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 1 discloses a toddler's walking, learning, and toilet training stages, but fail to particularly define what these stages are. The stages of development in which a child is walking and learning overlap and encompass several years, and therefore are not distinctly defined by the claim language. Claim 2 further defines the walking stage as comprising a phase wherein the toddler is capable of standing and walking. However, once a toddler is capable of standing and walking, the toddler continues to do so for the remainder of its life, presumably. Therefore, the walking stage has no definitive upper boundary, and the scope of the limitation cannot be determined. Likewise, claims 4 and 6 disclose phases that fail to distinctly define the learning and toilet training stages.

Claim 14 discloses each stage of development includes indicia depicting a toddler wearing the chassis design corresponding to the stage of development. It is unclear how a stage of development could include an indicia comprising a picture.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

> A person shall be entitled to a patent unless –
>
> (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.
> (e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

Claims 1-6 and 14 are rejected under 35 U.S.C. 102(e) as being anticipated by Dragoo et al. (6,229,061).

Dragoo discloses an array of disposable diapers designed to fit toddlers, as described in column 2, lines 19-37. The diapers each comprise a chassis, as shown in figure 1, and are fully capable of being used in any stage of the toddler's development. The diapers comprise flexible fasteners, as disclosed in column 8, lines 42-65, and high stretch sides, as disclosed in column 4, lines 1-8. The diaper is fully capable of being pulled on, and the diaper is worn around the lower torso of the wearer, and therefore looks like underwear.

With respect to claim 14, the claim does not further limit the structural features of the article of claim 1, and therefore Dragoo anticipates claim 14 for the reasons stated above in the rejection of claim 1.

Claims 1-2, 4, 6, and 14 are rejected under 35 U.S.C. 102(b) as being anticipated by Miller (5,839,585).

Miller discloses an array of absorbent articles comprising diapers and training pants, as disclosed in column 4, lines 48-50. The diapers each comprise a chassis and are fully capable of being used in any stage of the toddler's development.

With respect to claim 14, the claim does not further limit the structural features of the article of claim 1, and therefore Miller anticipates claim 14 for the reasons stated above in the rejection of claim 1.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claim 7 is rejected under 35 U.S.C. 103(a) as being unpatentable over Dragoo et al. (6,229,061) as applied to claim 6 above, and further in view of Matsushita (5,885,264).

Dragoo discloses all aspects of the claimed invention with the exception of a wetness indicator. Matsushita discloses a wetness indicator for a training pant, as

shown in figure 1. When wetted, the wetness indicator provides a feeling of wetness to the wearer, as disclosed in column 1, lines 57-67, to indicate to the wearer that the pant has been wetted. It would therefore be obvious to one of ordinary skill in the art at the time of invention to provide the training pant of Dragoo with the wetness indicator of Matsushita to allow the wearer to be aware of when the pant has been wetted.

Claim 3 is rejected under 35 U.S.C. 103(a) as being unpatentable over Miller (5,839,585) as applied to claim 2 above, and further in view of Huskey (5,599,620).

Miller discloses all aspects of the claimed invention with the exception of flexible fasteners. Huskey teaches the use of flexible fasteners to provide the diaper with greater comfort, as disclosed in column 1, lines 23-29. It would therefore be obvious to one of ordinary skill in the art at the time of invention to provide the diaper of Miller with flexible fasteners, as taught by Huskey, to provide the diaper with greater comfort.

Claim 5 is rejected under 35 U.S.C. 103(a) as being unpatentable over Miller (5,839,585) as applied to claim 4 above, and further in view of Nishikawa et al. (5,591,155).

Miller discloses all aspects of the claimed invention with the exception of the the training pant having a pull-on chassis. Nishikawa teaches a training pant having a pull-on chassis, as shown in figure 1. Unlike tape-tab chassis, the pull-on chassis allows the wearer to pull the garment on and off without assistance, as is desired during toilet training. It would therefore be obvious to one of ordinary skill in the art at the time of

invention to make the training pant of Miller a pull-on pant, as taught by Nishikawa, to allow the child being toilet trained to pull on the pant without assistance.

Claim 7 is rejected under 35 U.S.C. 103(a) as being unpatentable over Miller (5,839,585) as applied to claim 6 above, and further in view of Matsushita (5,885,264).

Miller discloses all aspects of the claimed invention with the exception of a wetness indicator. Matsushita discloses a wetness indicator for a training pant, as shown in figure 1. When wetted, the wetness indicator provides a feeling of wetness to the wearer, as disclosed in column 1, lines 57-67, to indicate to the wearer that the pant has been wetted. It would therefore be obvious to one of ordinary skill in the art at the time of invention to provide the training pant of Miller with the wetness indicator of Matsushita to allow the wearer to be aware of when the pant has been wetted.

Claims 15-17 and 19 are rejected under 35 U.S.C. 103(a) as being unpatentable over Miller (5,839,585).

Miller discloses all aspects of the claimed invention with the exception of the indicia depicting the use of the diapers on a standing or toilet training toddler. Miller discloses an array of absorbent articles that includes disposable diapers, as described in column 4, lines 44-50. The articles are designed to fit the same size wearer but serve different purposes, and the purposes are described by indicia on the packaging, as disclosed in column 3, lines 30-40. The examples given by Miller are drawn to absorbent articles for use as catamenial devices, but Miller discloses the invention may

also be applied to diapers. It would therefore be obvious to one of ordinary skill in the art at the time of invention to provide the packaging for the diapers of Miller with indicia to provide the article with a description of the purpose of the diaper, as taught by Miller in the examples given in column 3, lines 30-40.

Claim 18 is rejected under 35 U.S.C. 103(a) as being unpatentable over Miller (5,839,585) as applied to claim 15 above, and further in view of Nishikawa et al. (5,591,155).

Miller discloses all aspects of the claimed invention with the exception of the the training pant having a pull-on chassis. Nishikawa teaches a training pant having a pull-on chassis, as shown in figure 1. Unlike tape-tab chassis, the pull-on chassis allows the wearer to pull the garment on and off without assistance, as is desired during toilet training. It would therefore be obvious to one of ordinary skill in the art at the time of invention to make the training pant of Miller a pull-on pant, as taught by Nishikawa, to allow the child being toilet trained to pull on the pant without assistance.

Double Patenting

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington,* 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1, 3, 5, and 7 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 3 and 4 of U.S. Patent No. 6,648,864. Although the conflicting claims are not identical, they are not patentably distinct from each other because while the patented claims disclose stages of development identified as third through fifth, the stages of development correspond to the walking, learning, and toilet training stages of development. The conflicting claims are therefore not patentably distinct because they are drawn to the same subject matter and differ only in terminology.

Claims 15 and 19 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 3 and 4 of U.S. Patent No. 6,648,864. Although the conflicting claims are not identical, they are not patentably distinct from each other because while the patented claims disclose stages of development identified as first and second, the stages of development correspond to the walking and toilet training stages of development. The conflicting claims are therefore not patentably distinct because they are drawn to the same subject matter and differ only in terminology.

Conclusion

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. U.S. Patents 6,454,095; 5,242,057; 5,065,868; and 4,966,286 disclose arrays of absorbent articles.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to C. Lynne Anderson whose telephone number is (571) 272-4932. The examiner can normally be reached on Monday through Friday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Tanya Zalukaeva can be reached on (571) 272-1115. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

CLA
cla
September 16, 2005

TATYANA ZALUKAEVA
PRIMARY EXAMINER